ROBERT D. McCALLUM, JR.
Assistant Attorney General
DAVID W. SHAPIRO
United States Attorney
ARTHUR R. GOLDBERG (D.C. BN 180661)
MARK T. QUINLIVAN (D.C. BN 442782)
U.S. Department of Justice
Civil Division; Room 1048
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3346

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB RELATED C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0245 CRB PLAINTIFF'S OPPOSITION TO THE OCBC DEFENDANTS' MOTION FOR DISCOVERY UNDER FED.R.CIV.P. 56(f) Date: April 19, 2002 Time: 10:00 a.m. Courtroom: 8 Hon. Charles R. Breyer

STATEMENT

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("OCBC Defendants") have filed a request for discovery pursuant to Fed. R. Civ. P. 56(f). Because none of the matters on which the OCBC Defendants seek discovery has any relevance to the issue before the Court – whether they have distributed marijuana in violation of federal law -- their request for discovery should be denied.

STANDARDS

Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). To successfully invoke the benefits of Rule 56(f), an opposing party bears the burden of showing: (1) facts that will be discovered (2) that can raise a material issue, and (3) the likelihood that the evidence exists. See VISA International Service Ass'n v. Bankcard Holders of America, 784 F.2d 1472, 1475 (9th Cir. 1986).

In other words, "[a] Rule 56(f) applicant is entitled to relief only if he or she shows, among other things, that the discovery would uncover specific facts which would preclude summary judgment." United States Cellular Investment Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 939 (9th Cir. 2002) (citing Maljack Prods. v. GoodTimes Home Video Corp., 81 F.3d 881, 888 (9th Cir.1996)). If the discovery sought is irrelevant to the issues subject to consideration for summary judgment, then relief under Rule 56(f) is inappropriate. See, e.g., Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272, 1276 (9th Cir.1991); United States v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357, 1363-64 (9th Cir.1986). This is because Rule 56(f) is intended to prevent "fishing expeditions" by narrowing the scope of discovery to only that reasonably necessary to oppose a motion for summary judgment. See First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 298 (1968).

As we now demonstrate, the OCBC Defendants' request for discovery should be denied because none of the requested discovery has any relevance to the legal issues before the Court, and the OCBC Defendants therefore cannot establish a material issue of fact that is in dispute.

ARGUMENT

The OCBC Defendants contend that, if granted leave to depose the Special Agents of the Drug Enforcement Administration ("DEA") who purchased marijuana from them, "the following issues of material fact would arise:

(a) whether the agents' conduct was in fact fraudulent and improperly induced the sale of cannabis by Defendants, thereby creating an issue of material fact as to the affirmative defenses of entrapment and mistake of law.

(b) whether the agents actually witnessed the purchase of cannabis for medical purposes by OCBC's patient-members, thereby creating an issue of material fact as to Defendants' violation of the Controlled Substances Act ("CSA").

(c) whether the agents actually saw the plants they allege to be cannabis growing at the OCBC. Any evidence concerning this matter would create a disputed issue of material fact as to Defendants' violations of the CSA.

Declaration of Annette Carnegie ("Carnegie Dec.") ¶¶ 2(a)-(c).

None of this proposed discovery is relevant to the question before the Court -- whether the OCBC Defendants distributed and/or cultivated marijuana in violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(1). As a preliminary matter, there is no material dispute in this case that the OCBC Defendants engaged in the distribution of marijuana. The uncontradicted evidence -- which the OCBC Defendants have never specifically contested -- establishes that the OCBC Defendants engaged in the distribution of marijuana,[1] and this Court has previously recognized that "[i]t is * * * undisputed that defendants distribute marijuana. Defendants do not challenge the federal government's evidence to the extent it establishes that defendants provide marijuana to seriously ill patients or their primary caregivers for personal use by the patient upon a physician's recommendation." 5 F. Supp.2d at 1099. Likewise, in granting the government's motion for civil contempt against the OCBC Defendants, this Court noted that those defendants had "offered no facts whatsoever to controvert plaintiff's evidence that defendants distributed marijuana on May 21, 1998. Nor have they identified any evidence that they could present to a jury that they have not already presented that would create a dispute of fact." October 13, 1998 Memorandum and Order re: Motions in Limine and Order to Show Cause in Case No. 98-0088, slip op. at 11.

---

[1] See Declaration of Special Agent Brian Nehring ¶¶ 4-13 (purchase of marijuana for $40) (Exhibit 1); Declaration of Special Agent Bill Nyfeler ¶¶ 4-32 (three separate purchases of marijuana for $7, $15, and $45) (Exhibit 2); Declaration of Special Agent Carolyn Porras ¶¶ 4-15 (purchase of marijuana for $25) (Exhibit 3); Declaration of Special Agent Deborah Muusers ¶¶ 4-13 (purchase of marijuana for $60) (Exhibit 4); Declaration of Phyllis E. Quinn ¶¶ 4-9 (chemist analysis confirming presence of marijuana from six OCBC sales) (Exhibit 5).

The OCBC Defendants nonetheless seek discovery regarding whether they were in compliance with the Compassionate Use Act when they engaged in the distribution of marijuana, such as "whether the agents' conduct was in fact fraudulent and improperly induced the sale of cannabis by Defendants," or "whether the agents actually witnesses the purchase of cannabis for medical purposes by OCBC's patient-members." Neither of these issues has any relevance to the issues before the Court. As this Court has previously ruled, "[a] state law which purports to legalize the distribution of marijuana for any purpose * * * directly conflicts with federal law, 21 U.S.C. § 841(a)(1). Section 841 prohibits the distribution of marijuana except for use in an approved research project. It does not exempt the distribution of marijuana to seriously ill patients for their personal medical use." United States v. Cannabis Cultivators Club, 5 F. Supp.2d 1086, 1100 (N.D. Cal. 1998). See also United States v. Rosenberg, 515 F.2d 190, 198 n.14 (9th Cir.) ("The question of whether *federal* criminal laws have been violated is a *federal* issue to be determined in *federal* courts." (emphasis supplied)), *cert. denied*, 423 U.S. 1031 (1975). Hence, discovery regarding whether the OCBC Defendants were in compliance with *state* law has no bearing on the issues before the Court.

The OCBC Defendants also seek discovery to establish the entrapment or mistake of law defenses. Both are foreclosed as a matter of law. "A defense of entrapment is established if the defendant was (1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime." United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). The OCBC Defendants have not made (and cannot make) either showing. In particular, their argument that they "were not predisposed to providing cannabis to persons without the proper authorization," Joint Reply at 29 n.10, is irrelevant to the issues before the Court because the Controlled Substances Act makes it unlawful to distribute marijuana whether or not a customer has a proper authorization. See 5 F. Supp.2d at 1100 ("Section 841 prohibits the distribution of marijuana except for use in an approved research project.").

Nor may the OCBC Defendants avail themselves of the mistake of law defense. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply

rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), and the Ninth Circuit has precluded invocation of this defense where it is premised on the assertion that the defendant did not know that his or her conduct violated federal law. See United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996).

The OCBC Defendants also seek discovery regarding "whether the agents actually saw the plants they allege to be cannabis growing at the OCBC." But, here again, the OCBC Defendants do not here and have never specifically denied that they engaged in the cultivation of marijuana, and the testimony of the DEA Special Agents, all of whom had participated in numerous investigations involving both the indoor and outdoor cultivation of marijuana, and personally examined numerous indoor and outdoor marijuana plants, is unequivocal that they observed the cultivation of marijuana on the OCBC's premises.[2] Here again, the OCBC Defendants have failed to identify a genuine issue of material fact that would preclude summary judgment.

The OCBC Defendants next "seek discovery from the government concerning any research conducted regarding the medical efficacy of cannabis as well as the government's response to efforts to conduct research on that subject," and assert that "[t]his discovery bears directly upon whether the federal government has blocked any research and/or blocked studies regarding the medical efficacy of cannabis and whether a compelling interest or even a rational basis exists for denying seriously ill patients access of medical cannabis," and "bears directly upon whether the government is guilty of

---

[2] See Nehring Dec. ¶ 10 ("This individual was sitting next to a display case which contained two large growing marijuana plants under lights, and I also observed several large marijuana plants growing in a Mylar-lined display case at the opposite corner of the room.") (Exhibit 1); Nyfeler Dec. ¶ 8 ("I observed approximately fifty marijuana plants in various stages of growth, from small clones to large flowering adult plants.") (Exhibit 2); id. ¶ 19 ("During this tour, I observed approximately 10 growing marijuana plants in the hallway, under a sign which read 'Educational Grow.'"); id. ¶ 29 ("I further observed that the hydroponic marijuana grow display still contained several live marijuana plants."); Porras Dec. ¶ 10 ("In this room, I observed at least fifteen marijuana plants being grown, with lights, fans, and timer clocks pointed directly at the plants.") (Exhibit 3); Muusers Dec. ¶ 10 ("Inside one of the glass cases were approximately 20-25 6"-8" inch marijuana plants growing inside. Against one wall of the 'bar' area was a cubicle with grow lights and approximately 5-6 larger plants, approximately 3'-3 ½' tall.").

unclean hands." Carnegie Dec. ¶ 3. This contention also is foreclosed by Ninth Circuit authority. In United States v. Miroyan, 577 F.2d 489 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978), the Ninth Circuit stated that "we need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" Id. at 495 (quoting United States v. Rogers, 549 F.2d 107, 108 (9th Cir. 1976)). This Court therefore has rejected a rational basis challenge to marijuana's placement in Schedule I, on the ground that "the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational." December 3, 1998 Order in Case No. 98-0086, slip op. at 1 (citing Miroyan, 577 F.2d at 495). This Court further held that, no matter how framed, a rational basis challenge to the Controlled Substances Act "is in essence an argument that this Court should reclassify marijuana because there is no substantial evidence to support its current classification," and that "[r]eview of the Attorney's General decision as to the classification of a controlled substance is limited to the District of Columbia Court of Appeals or the circuit in which petitioner's place of business is located." Id. slip op. at 2 (internal citation omitted). Hence, because the question of marijuana's placement in Schedule I has been decided adversely to the OCBC Defendants as a matter of law, they are not entitled to discovery regarding this issue.

The OCBC Defendants' attempt to pursue discovery to establish an "unclean hands" argument likewise has been foreclosed as a matter of law. This Court has determined that "the fact that medical marijuana advocates have been unsuccessful in convincing the federal government decision makers that marijuana should be rescheduled as a Schedule II controlled substance and thus made available to seriously ill patients upon a physician's recommendation * * * does not mean that the federal government has acted with unclean hands." United States v. Cannabis Cultivators Club, 5 F. Supp.2d 1086, 1105 (N.D. Cal. 1998). Indeed, as this Court noted, as recently as 1994, the D.C. Circuit has upheld the DEA Administrator's decision not to reschedule marijuana. Id. (citing Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994)).

Finally, the OCBC Defendants seek discovery "concerning the basis for the government's claim that the solely intrastate cultivation, distribution and consumption of medical cannabis substantially affects interstate commerce." Carnegie Dec. ¶ 4. This issue, too, has been foreclosed by binding Ninth Circuit authority, which holds that the intrastate distribution and cultivation of controlled substances is a commercial activity which substantially affects interstate commerce. See United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Staples, 85 F.3d 461, 463 (9th Cir.), *cert. denied*, 519 U.S. 938 (1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied*, 502 U.S. 969 (1991); United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), *cert. denied*, 410 U.S. 985 (1973). The OCBC Defendants also are patently wrong in suggesting that this Court may take into account the alleged medicinal purposes for their actions; the Supreme Court has made clear that section 841(a)(1) "precludes consideration of this evidence." United States v. Oakland Cannabis, 532 U.S. 483, 499 (2001).

CONCLUSION

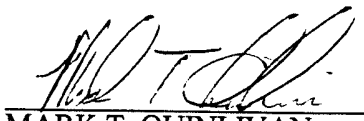
For the foregoing reasons, the Court should deny the OCBC Defendants' motion for discovery under Fed. R. Civ. P. 56(f).

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

DAVID W. SHAPIRO
United States Attorney

ARTHUR R. GOLDBERG
Assistant Branch Director



MARK T. QUINLIVAN
Senior Counsel
U.S. Department of Justice
Civil Division, Room 1048
901 E St., N.W.
Washington, D.C. 20530
Tel: (202) 514-3346

Attorneys for Plaintiff
UNITED STATES OF AMERICA

Dated: April 4, 2002

CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY

I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice, whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on the 19th day of April, 2002, I caused to be served a copy of the following documents:

- Plaintiff's Opposition to Defendants' Motion for Discovery Under Fed. R. Civ. P. 56(f); and
- a [Proposed] Order

by overnight deliver on the following counsel for the defendants, intervenors, and amicus curiae:

Oakland Cannabis Buyer's Cooperative, *et al.*

Annette P. Carnegie
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

Gerald F. Uelmen
Santa Clara University
School of Law
Santa Clara, CA 95053

Randy Barnett
Harvard Law School
1525 Massachusetts Ave.; Griswold 308
Cambridge, MA 02138

Marin Alliance for Medical Marijuana, *et al.*

William G. Panzer
370 Grand Avenue, Suite 3
Oakland, CA 94610

Cannabis Cultivators Club, *et al.*
J. Tony Serra
Serra, Lichter, Daar, Bustamante, Michael & Wilson
506 Broadway
San Francisco, CA 94133

Ukiah Cannabis Buyer's Club, *et al.*

Susan B. Jordan
515 South School Street
Ukiah, CA 95482

David Nelson
Nelson & Riemenschneider
106 North School Street
Ukiah, CA 95482

Santa Cruz Cannabis Buyers Club

Kate Wells
2600 Fresno Street
Santa Cruz, CA 95062

Intervenors

Thomas V. Loran, III
Margaret S. Schroeder
Pillsbury Winthrop LLP
50 Fremont Street, 5th Floor
San Francisco, CA 94105

Amicus Curiae State of California

Taylor S. Carey
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, #450
Oakland, CA 94612

John A. Russo
City Attorney
Barbara J. Parker
Chief Assistant City Attorney
City of Oakland
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

Amicus Curiae American Civil Liberties Union

Graham A. Boyd
American Civil Liberties Union Foundation
85 Willow Street
New Haven, CT 06511

Ann Brick
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street
San Francisco, CA 94103

Jordan C. Budd
American Civil Liberties Union
Foundation of San Diego & Imperial Counties, Inc.
110 West C Street, Suite 901
San Diego, CA 92101

Peter Eliasberg
American Civil Liberties Union
Foundation of Southern California, Inc.
1616 Beverly Blvd.
Los Angeles, CA 90026

MARK T. QUINLIVAN